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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 729

NATE STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 337 F. 2d 14.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1964. A petition for rehearing was denied on October 30, 1964. The petition for a writ of certiorari was filed on November 30, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's convictions for subornation of perjury and obstruction of justice.

2. Whether the government's payment of fees to a witness denied petitioner a fair trial.

STATEMENT

In the United States District Court for the Southern District of California, petitioner was tried by a jury and convicted on one count of subornation of perjury in violation of 18 U.S.C. 1622, two counts of obstructing justice in violation of 18 U.S.C. 1505, and one count of willful failure to file a federal income tax return in violation of 26 U.S.C. 7203 (I R. 2–8, 17). Petitioner was sentenced to imprisonment for three years on each of counts one, two, and three, the sentences to run concurrently; imposition of sentence was suspended on count four, and petitioner was placed on three years' probation to follow his imprisonment (I R. 23). The conviction with respect to the income tax conviction under count four of the indictment is not challenged.

1. The perjury involved related to four checks (Exhibits 5, 8, 10, 18) issued by locals of the Teamsters Union in Kansas City, Missouri, and Detroit, Michigan, payable to one Joel Benton or to "Joel Benton and Associates" (II R. 54–57, 59–61, 63, 66).

Benton, who was in the advertising business, testi-

fied at the trial that petitioner, a business acquaintance, first asked Benton's help in cashing a check in the fall of 1955 (II R. 43-46, 52-54). A check for $900 payable to "Joel Benton and Associates" was endorsed by Benton and cashed by petitioner at a pharmacy in Los Angeles (II R. 55-59). Thereafter, in 1956, petitioner had Benton endorse three checks payable to Joel Benton, two for $1,000 and one for $1,500 (II R. 59-66). All four checks were cashed at Schwabs Pharmacy in Los Angeles, California. Benton did not know the personnel at Schwabs, and never cashed a check there (III R. 123-125). The personnel at Schwabs testified that they did not know Benton, and that they would not have cashed a substantial check for Benton alone; they did know petitioner, however, and over the years they had cashed many checks for him (IV R. 395-479).

Benton received none of the money from the four checks (II R. 59, 61, 64, 67; III R. 110-111, 114, 116). At petitioner's request, Benton included the $900 check in his own income tax return for 1955, and the $3,500 of the remaining three checks in his income tax return for 1956 (II R. 68-70). To reimburse Benton for the tax payments, petitioner paid Benton $485 in cash in January of 1957 (II R. 68-71). Petitioner did not file federal income tax returns for 1955 or 1956 (IV R. 520-521; Exhibit 27).

2. In the spring of 1958, after petitioner had himself been subpoenaed by the McClellan Committee on

April 11, 1958, he told Benton that there was "a big investigation going on," and that Benton might be contacted (II R. 74; V R. 549; Exhibit 44). Petitioner said that Benton should "have a story ready to tell the investigators to account for the money" represented by the $4,400 in checks (II R. 74). Petitioner instructed Benton to tell the investigators that he (Benton) had been paid to make a confidential count of trucks moving on highway 99 and highway 101 for the purpose of determining how many trucks travel over those routes in a twenty-four hour period (II R. 74). Benton agreed to tell this story, but said he would need some information on the flow of truck traffic "so that it would at least sound plausible" (II R. 76). Petitioner supplied such information to Benton (II R. 76). Benton suggested that as to the fourth check, $1,500 was a lot of money for counting trucks. Petitioner then recommended that Benton "come up with some kind of a TV idea which might be used for national broadcasting purposes * * * extolling the virtues of the various unions" (II R. 77). Benton spent a half hour putting down on paper an outline of a television program along the lines suggested by petitioner (II R. 77–78).

3. Benton was subsequently questioned by investigators of the McClellan Committee during May and June of 1958 (II R. 7–8, 25). Benton advised petitioner that he had been contacted by investigators, and discussed his overall story with petitioner before giving the investigators any statement or affidavit

(III R. 99–102, 118). In a series of meetings with the investigators, Benton gave them a statement, and later an affidavit, which contained the false story petitioner had suggested concerning the truck count and the preparation of a television program (II R. 8–16, 25–29, 78–138; Exhibits 24, 25A, 25B). Benton gave petitioner a copy of the statement he made to the investigators (III R. 99–101). In his affidavit (Exhibit 25B), Benton specifically incorporated the information contained in his statement, and swore that all statements made therein were true and correct (II R. 12–16, 24–35, 88–90). On June 26, 1958, the day before Benton made the affidavit, he was served with a McClellan Committee subpoena by investigator Malone (II R. 41, 87). The affidavit was sent to the McClellan Committee (II R. 16), and was read into the record on September 15, 1958 (III R. 274–275). Benton, in his affidavit, swore that James Hoffa wanted the truck count made, and that petitioner gave Benton the first three checks for making such counts (II R. 82–84). Benton also stated that the fourth check, in the amount of $1,500, was for a truck count and the television program outline (II R. 84–86, 92–94).

Benton testified that he knew the averments in his statement and affidavit were false at the time he made them (II R. 117); that he was told by petitioner to give these false statements (II R. 118–120); and that he committed perjury because of fear of a great number of people, including petitioner (II R. 126, 138).

Benton voluntarily gave the United States Attorney the substance of his trial testimony in June 1962 (V R. 535–537).

4. The check (Exhibit 5) issued by Local 41 in Kansas City, Missouri, was signed by Roy Williams and Floyd Hayes, both of whom testified that they never met Joel Benton, that they never hired Benton, that they never hired anyone to count trucks, and that the $900 check payable to "Joel Benton and Associates" was not for counting trucks in California (IV R. 330–346, 352–356). The three checks (Exhibits 8, 10, 18) issued by Local 299 in Detroit, Michigan, were signed by James Hoffa and Frank Collins, both of whom testified that they did not know Joel Benton, and that they did not hire Benton for anything (III R. 222–248, 263–312). Hoffa was interested in information regarding "piggy back" trucking operations in certain areas, but he was unable to recall ever hiring Benton in any connection (III R. 271–283). Petitioner, on the other hand, had done a great deal of work for Hoffa and the Teamsters Union (III R. 222–257, 263–312; IV R. 333–349, 353–358). Hoffa had no recollection of petitioner's ever bringing in an outline of a television show (III R. 321).

The stubs of the checks indicated that they were written for the following purposes: (1) the first check, for $900, was for "Public Relations work by Nate Stein—30 days"; (2) the second check, for $1,000, was for "advertising"; (3) the third check, for $1,000, was for "Advertising * * * Re James R. Hoffa Tes-

timonial Dinner"; and (4) the fourth check, for $1,500, was for "Advertising * * * and Services Rendered" (Exhibit 26). For each check written, there was a voucher prepared for the "Joel Benton and Associates" letterhead (II R. 61–62, 65–66, 67–68). Joel Benton did not prepare these vouchers or cause them to be prepared (II R. 63, 65, 68; III R. 177–180, 193).

ARGUMENT

1. Petitioner's principal challenge is to the sufficiency of the evidence to sustain his convictions on counts one, two, and three—an issue which obviously does not warrant further review by this Court. In any event, the convictions on all counts are amply supported by the record.[1]

a. With respect to the first count, Benton's direct testimony admitting perjury was corroborated by: (1) the four checks involved; (2) the testimony of the owners and employees of Schwabs Pharmacy that they cashed checks for petitioner but not for Benton; (3) the testimony of Hoffa, Collins, Williams and Hayes to the effect that they did not hire Benton or pay him to count trucks or plan a television program, and that they did not know him; (4) the check stubs and vouchers indicating that the checks were

[1] Since petitioner was given concurrent three-year sentences on each of the first three counts of the indictment, this Court need not inquire into the sufficiency of the evidence on more than one of these three counts. *Sinclair* v. *United States*, 279 U.S. 263, 299; *Abrams* v. *United States*, 250 U.S. 616, 619; *Byrnes* v. *United States*, 327 F. 2d 825 (C.A. 9).

written for a purpose different from that described by Benton in his affidavit to the investigators. The rule requiring proof of the falsity of a statement by more than the uncorroborated oath of a single witness [2] has thus been amply satisfied in this case.

Petitioner also argues (Pet. 32–36) that the evidence does not show that he knew that Benton would be asked to take an oath or that he would in fact testify under oath. The record shows, however, that petitioner had reason to know that Benton would be required to give sworn testimony to the committee or its investigators. Petitioner himself was served with a McClellan Committee subpoena on April 11, 1958 (V R. 549; Exhibit 44).[3] He contacted Benton during the spring of 1958 for the express purpose of alerting Benton to the fact that an investigation was pending, and he instructed Benton to give false explanations regarding the purposes for which the four checks had been issued (II R. 74–78). Benton notified petitioner after he had been contacted by the investigators, and he discussed his overall story with petitioner before giving the investigators any statement or affidavit (III R. 99–102, 118). Benton also gave petitioner a copy of his statement to the investigators (III R. 99–101). These actions by petitioner and

[2] See *Hammer* v. *United States*, 271 U.S. 620, 626; *Weiler* v. *United States*, 323 U.S. 606, 609–610.

[3] Petitioner testified before the McClellan Committee on September 11, 1958 (See Hearings before the Senate Select Committee on Improper Activities in the Labor or Management Field, 85th Congress, Second Session, Part 40, pp. 14986–14992).

Benton demonstrated that both men anticipated that Benton would be required to testify, and both were preparing for that eventuality. Benton was served with a McClellan Committee subpoena on June 26, 1958, the day before he gave his false affidavit (II R. 7–8, 10–12, 41, 87).

Petitioner's suggestion (Pet. 33) that perjury cannot be committed through an affidavit, as distinguished from oral testimony, is without merit. 18 U.S.C. 1621 provides in pertinent part:

> Whoever, having taken an oath * * * that he will testify, *declare, depose,* or *certify* truly, or that any *written testimony, declaration, deposition,* or *certificate* by him subscribed, is true, willfully and contrary to such oath states or *subscribes* any material matter which he does not believe to be true, is guilty of perjury, * * *. [Emphasis supplied.]

Under the plain language of the statute, the offense of perjury embraces more than oral testimony on a witness stand. See *United States* v. *Hvass,* 355 U.S. 570, 574; *Morgan* v. *United States,* 309 F. 2d 234 (C.A. D.C.); *United States* v. *Curcio,* 279 F. 2d 681 (C.A. 2), certiorari denied, 364 U.S. 824; *United States* v. *Seavey,* 180 F. 2d 837 (C.A. 3), certiorari denied, 339 U.S. 979; *Butler* v. *McKey,* 138 F. 2d 373, 377 (C.A. 9).

b. With respect to counts two and three, under which petitioner was convicted of obstructing justice by corruptly influencing Benton to testify falsely and by corruptly influencing Benton to give false informa-

tion to committee investigators, the falsity of the information given to the committee by Benton is established by the evidence discussed above. Petitioner's acts of corruptly influencing Benton are established by Benton's direct testimony. Contrary to petitioner's assertion, the "two-witness" rule does not apply here, since proof of *inducement* of perjury does not require the corroboration necessary to establish the falsity of the allegedly perjurious statement. *Hammer* v. *United States,* 271 U.S. 620; *Culwell* v. *United States,* 194 F. 2d 808, 812 (C.A. 5); *Catrino* v. *United States,* 176 F. 2d 884, 888 (C.A. 9).

Petitioner's contention that Benton was not a "witness" within the meaning of the statute is without merit. Although we have found no decisions construing that word in 18 U.S.C. 1505, the term "witness" has been construed in similar statutes to encompass anyone who is expected to testify or to be called as a witness. See *Roberts* v. *United States,* 239 F. 2d 467 (C.A. 9); *United States* v. *Grunewald,* 233 F. 2d 556 (C.A. 2), reversed on other grounds, 353 U.S. 391; *Odom* v. *United States,* 116 F. 2d 996 (C.A. 5), reversed on other grounds, 313 U.S. 544; *Walker* v. *United States,* 93 F. 2d 792 (C.A. 8); *Sullivan* v. *United States,* 15 F. 2d 809, 812 (C.A. 4); *Smith* v. *United States,* 274 Fed. 351, 353 (C.A. 8). The record here fully supports the inference that petitioner expected Benton to be a witness before the committee.

The fact that Benton was not under subpoena when he first gave false information is not controlling, for it had previously been anticipated that he would be called to testify, as his preparation of the false information indicates. *United States* v. *Presser,* 292 F. 2d 171, 174 (C.A. 6), affirmed, 371 U.S. 71; *Samples* v. *United States,* 121 F. 2d 263, 266 (C.A. 5), certiorari denied, 314 U.S. 662. Petitioner's reliance on *Berra* v. *United States,* 221 F. 2d 590 (C.A. 8), is misplaced, since the government adduced no evidence in that case to show that the person allegedly suborned intended, desired, or expected to testify. 221 F. 2d at 596–597.

2. Petitioner also contends in this Court that the witness fees paid to Benton by the government operated in some unspecified manner to deprive petitioner of a fair trial (Pet. 37–38). Benton, who had been discharged from his employment and was under protective custody at the time of the trial, testified that he had been paid witness fees amounting to $100 per week from about the second or third week in May 1963 (III R. 139, 181–182, 212). This matter was thoroughly developed at the trial. There is no substance to petitioner's unsupported assertion that these payments, which began long after Benton volunteered his testimony to the government in June 1962 (V R. 533–537), represented payments for testimony within the meaning of 18 U.S.C. (Supp. V) 201(h) or 201(i).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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